IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1142

RUBEN MORALES ROBLES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL J. BROWN, P.C.
222 North Court Avenue
Tucson, Arizona 85701
Counsel for Petitioner

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222 North Court Avenue
Tucson, Arizona 85701

Counsel for Petitioner

The petitioner, Ruben Morales Robles, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case, entered on November 1, 1977.

OPINION BELOW

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 1, 1977. A denial of a timely petition for rehearing was entered on January 13, 1978.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported but is attached hereto, infra, as Appendix A.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

A) When, at the behest of the defendant, a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution mandate that the defendant be given credit for punishment imposed by the court and endured by him after the first trial; when the court, after retrial and conviction, sentences the defendant a second time for the same offense?

B) Is the failure of the United States to give a defendant a fair and impartial trial for a period of three years after the date of the offense, without the fault of the defendant, a denial of defendant's rights under the Fifth and Sixth Amendments to the United States Constitutions?

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Amendment V to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. Amendment VI to the United States Constitution

In all criminal prosecutions, the

accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On April 3, 1974, the petitioner was arrested by agents of the United States Government for distribution of cocaine. On May 9, 1974, petitioner was charged by indictment with distribution of cocaine in violation of U.S.C. §841(a)(1).

On August 14, 1974, the petitioner was found guilty by jury verdict. On September 18, 1974, judgment was entered on the verdict and petitioner was sentenced to: (1) a term of imprisonment for five years; (2) a $3,000 fine; (3) five years special parole, pursuant to statute.

On September 20, 1974, petitioner was released on bond pending appeal.

On May 1, 1975, a panel of the United States Court of Appeals for the Ninth Circuit reversed and remanded the case with directions to dismiss the indictment. On October 16, 1975,

however, the case was withdrawn from the panel and taken en banc by the Ninth Circuit court. On July 26, 1976, the en banc court reversed Robles' conviction and remanded the case for retrial. United States v. Robles, 546 F.2d 798, 804 (9th Cir. 1976). Robles' petition for writ of certiorari was denied by the United States Supreme Court on February 22, 1977 (97 S.Ct. 1155).

Copy of this court's order was filed with the Clerk of the trial court on March 8, 1977. The case was set down for retrial on April 5, 1977, the defendant was found guilty and on April 28, 1977, was sentenced to exactly the same sentence imposed by the court after the first trial, to-wit: (1) a term of imprisonment for five years; (2) a $3,000 fine; and (3) five years special parole, pursuant to

statute. The trial court set conditions of release pending appeal and set appeal bond (see Appendix D).

On April 29, 1977, defendant posted bond and agreed to the conditions of release set forth by the court.

On November 1, 1977, the Ninth Circuit Court of Appeals affirmed the judgment of the trial court in an opinion which is not yet reported but which is contained in Appendix A hereto. The defendant filed a timely motion for rehearing on November 11, 1977 (Appendix B) and an order was entered denying said motion on January 13, 1978 (Appendix C).

The petitioner, Ruben Morales Robles, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case, entered on November 1, 1977.

The trial court set forth no reasons why the defendant should be punished more for having appealed than if he had served the sentence imposed by the court in September of 1974; there was no evidence before the court at the time of sentencing on April 28, 1977, that the defendant had lived anything other than an exemplary life from April of 1974 to April of 1977.

REASONS TO GRANT WRIT

This court should grant the writ in the instant case because:

I.

THE NINTH CIRCUIT HAS RULED ON AN IMPORTANT FEDERAL QUESTION CONCERNING THE RIGHTS OF AN ACCUSED UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION; THE ISSUE RULED UPON HAS BEEN PREVIOUSLY DECIDED BY THIS COURT IN NORTH CAROLINA v. PEARCE, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969). THE NINTH CIRCUIT COURT'S OPINION IN THE INSTANT CASE REFUSES TO FOLLOW THIS COURT'S OPINION IN NORTH CAROLINA v. PEARCE.

This court has consistently recognized that the Fifth Amendment's guarantee against "double jeopardy" extends to multiple punishment for the same offense.

"We think it is clear that

> the basic constitutional guarantee [against double jeopardy] is violated when punishment already exacted for an offense is not fully credited in imposing a sentence upon a new conviction for the same offense."

North Carolina v. Pearce, 395 U.S. 711, 718.

In the instant case, the defendant successfully appealed his conviction and, upon remand, was retried, convicted and resentenced. The interval between the original conviction and resentence was approximately three years. Defendant was not imprisoned during the interval between the trials (with the exception of approximately five days) but was living under stringent restrictions mandated by his appeal bond set by the

trial court (the bond's requirements are set forth in Appendix D). During this interval while the defendant was "free" on bond, he suffered severe curtailment of his constitutionally safe-guarded rights to due process, privacy, freedom of association, and freedom of movement. These specific losses of rights were in addition to burdens delineated in the cases cited below. The abrogation of these constitutional rights and the imposition of extraordinary burdens is punishment. As such, it is mandated by North Carolina v. Pearce, supra, that said punishment be credited in some manner or degree upon resentencing.

The Courts of Appeals, in dealing with this issue, have uniformly sidestepped the thrust of this argument, relying instead on 18 U.S.C. 3568, which deals with "custody" as opposed

to "punishment." See United States v. Peterson, 507 F.2d 1191 (D.C. 1974); Cochran v. United States, 489 F.2d 691 (5th Cir. 1974); Polakoff v. United States, 489 F.2d 727 (5th Cir. 1974); Sica v. United States, 454 F.2d 281 (9th Cir. 1971). These cases have found that if there was no "custody," then the defendant was entitled to no credit; ignoring the issue of punishment and the holding of Pearce, supra, completely. The cases reported, supra, not only do not deal with the question of punishment, but counsel has not found them to be in point factually either. In United States v. Peterson, supra, the defendants were released prior to their original trial on bail or on bond during the appeal. The facts disclosed of record do not reflect that their appeals were meritorious and the court deals only with whether or not

the time spent on bail was equivalent to time spent "in custody" as that is defined and used in 18 U.S.C.A §3568. Cochran v. United States, supra, dealt with the time spent on bail prior to the defendant pleading guilty. Polakoff v. United States, supra, was concerned with the time spent out on bail prior to the original trial. In Sica v. United States, supra, the time involved was spent on an unsuccessful appeal. None of the above cases dealt with the situation involved; where the defendant was released on bond pending appeal; the appeal was successful; the conviction was overturned, followed by a retrial, conviction and resentencing. This defendant has never submitted that he is entitled to credit for the time spent under the restrictions of his appeal bond under 18 U.S.C. §3568 as time

"in custody." Other than the five days this defendant spent in custody, the application of the statute to the case at bar is irrelevant. This defendant has submitted the following proposition:

1. Three years spent on a highly restrictive appeal bond while the defendant pursued a successful appeal, constitutes PUNISHMENT. Punishment is the denial of rights or the addition of burdens to a defendant. There is a wide spectrum of punishment, from death to the imposition of a nominal fine. All are punishments, differing only in the degree of rights lost or burdens imposed. This court has recognized many lost rights and additional burdens imposed on defendants in situations similar to the one imposed upon the instant defendant as punishment. In Hensley v. Municipal Court, 411 U.S.

345, this court, in discussing bond requirements identical to those imposed on the instant defendant, stated:

> "The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individuals' liberty. Since habeas corpus is an extraordinary remedy. . . its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." Hensley, supra, at 351

Finding the bond restraints sufficiently severe and immediate to defendant's liberty to allow the habeas corpus action,

the court noted:

> "He cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice. Disobedience is itself a criminal offense." Hensley, supra, at 352

In United States v. Marion, 404 U.S. 307, the court stated:

> "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he be free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy and

create anxiety in him, his family and his friends." Marion, supra, at 313, 314.

In United States v. Ewell, 383 U.S. 116 (1966); Smith v. Hooey, 393 U.S. 374 (1969); Strunk v. United States, 412 U.S. 434 (1972), the court spoke of the inherent anxiety and concern accompanying public accusation.

"The speedy trial guarantee recognizes that a prolonged delay may subject the accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties and the prospect of facing public trial or receiving a sentence longer than, or consecutive to, the one he is presently serving. . . uncertainties that a prompt

trial remove." Strunk, supra, at 439.

Klopfer v. North Carolina, 386 U.S. 213, discussed restraints on an individual's freedom and found them oppressive where there was a suspension of prosecution and the defendant was under no court-imposed restrictions:

"The petitioner is not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him to go whithersoever he will. The pendency of the indictment may subject him to public scorn and deprive him of employment, and most certainly will force a curtailment of his speech, association and participation in unpopular

causes." Klopfer, supra, 220.

The oppression of an individual's liberty discussed in Klopfer is significantly increased where, as with the instant defendant, there are strict court-imposed restraints with which there must be compliance under penalty of imprisonment.

Certainly, it was not the same degree of punishment as being incarcerated during the same period of time; however, it was punishment nevertheless.

2. This defendant is entitled to SOME CREDIT for the punishment he has already endured when he is, after a retrial and conviction, sentenced again for the same criminal act. The defendant is entitled to this credit under the Fifth Amendment to the United

States Constitution and the mandate expressed by this honorable court in North Carolina v. Pearce, supra.

II.

THE NINTH CIRCUIT'S REFUSAL TO REQUIRE THE TRIAL JUDGE TO AFFIRMATIVELY INDICATE HIS REASONS FOR IMPOSING HARSHER PUNISHMENT UPON THE DEFENDANT AFTER THE DEFENDANT'S ORIGINAL CONVICTION HAD BEEN SET ASIDE IGNORED THE DEFENDANT'S FIFTH AMENDMENT RIGHT TO DUE PROCESS AS EXPOUNDED BY THIS COURT IN NORTH CAROLINA v. PEARCE, SUPRA.

North Carolina v. Pearce, supra, imposed a duty on the trial judge to state his reasons in the record for imposing a harsher sentence on a defendant where there has been a successful

appeal followed by a reconviction and resentence.

> "Thus whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of defendant occurring after the time of the original sentencing proceeding."
> North Carolina v. Pearce, supra, at 725.

This mandate was prescribed in order that a defendant's right to due process would not be violated nor would there be a "chilling" of the exercise of basic constitutional rights due to

fear of vindictiveness and reprisal. North Carolina v. Pearce, supra, at 724, 725. It is petitioner's belief that when a judge, who also presided at the original trial, imposes the identical sentence more than three years later upon a successful appellant, it is no longer the original sentence but a harsher one, thus triggering Pearce's mandate. In the case at bar, by not stating his reasons for imposing this additional punishment, the trial judge violated the holding in North Carolina v. Pearce, supra. While Pearce and its progeny spoke of "harsher" sentences upon reconviction, the discussion in the case and the rationale behind its decision was not "sentences" but punishment. The Fifth Amendment guarantee against double jeopardy consists of three separate constitutional protections:

(1) A second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; (3) against multiple punishments for the same offense. This last protection is what is necessarily implied in any consideration of the question whether, "in the imposition of sentence for the same offense after retrial, the Constitution requires that credit must be given for punishment already endured" [Emphasis ours], North Carolina v. Pearce, supra, at 717.

> "If there is anything settled in the Anglo-American jurisprudence, it is that no one can be twice lawfully punished for the same offense." Ex parte Lange, 18 Wall. 163, 168, 21 L.Ed. 872.

> "The constitution was designed as much to prevent the criminal from being punished for the same offense as from being twice tried for it." Ex parte Lange, supra, 18 Wall. 163, 173.

> "We think it is clear that this basic constitutional guarantee is violated when punishment already exacted for an offense is not fully credited in imposing sentence upon a new conviction for the same offense." North Carolina v. Pearce, supra, at 718 (emphasis ours).

While Pearce did not find that the Constitution absolutely barred a more severe sentence or harsher punishment upon reconviction, the court set forth

that in the event a judge does impose a more severe sentence or harsher punishment upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. In addition, the court stated that:

> "Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding, and the factual data upon which the increased sentence is based must be a part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." North Carolina v. Pearce, supra, at 725.

The lower court imposed, by its orders, a harsher sentence and additional punishment upon reconviction without any finding of identifiable conduct on the part of the defendant occurring after the original sentencing proceedings to sustain it. The Ninth Circuit should not have allowed the sentence to stand without remanding it to the trial court for such finding or, in the alternative, for a reduction of the sentence.

III.

THE NINTH CIRCUIT HAS RULED ON AN IMPORTANT FEDERAL QUESTION CONCERNING THE RIGHTS OF AN ACCUSED TO A FAIR AND SPEEDY TRIAL UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES; THIS QUESTION HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Sixth Amendment mandates a trial that is "speedy and public."

This court has addressed the issue of a "speedy" trial: Pollard v. United States, 352 U.S. 354; Smith v. United States, 360 U.S. 1; United States v. Ewell, 383 U.S. 116; Klopfer v. North Carolina, 386 U.S. 213; Barker v. Wingo, 407 U.S. 514; Strunk v. United States, 412 U.S. 434; Dickey v. Florida, 398 U.S. 30; and found such right to be

fundamental and at the roots of our constitutionally protected judicial system. This court has also stated, in a concurring opinion authored by Justices Brennan and Marshall, that "speedy and public adjudication" are linked together.

> "The Sixth Amendment, of course, links the rights of speedy and public adjudication, guaranteeing in one phrase 'a speedy and public trial.'" Dickey v. Florida, 398 U.S. 30, 39.

The requirement of a public trial is really that of a fair trial.

> "We start with the proposition that it is a 'public trial' that the Sixth Amendment guarantees to the accused. The purpose of the requirement

> of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned." Estes v. Texas, 381 U.S. 532, 538-539 (1965).

The defendant's position is that he must be given a fair and speedy trial under the Sixth Amendment and that those two adjectives must honestly modify and describe the SAME trial. In the case at bar, the defendant was arrested in April of 1974. He received a "speedy" trial in August, 1974. The defendant's conviction was reversed, showing conclusively that the trial in 1974, while speedy, was not fair. More than three years later, the defendant was given a "fair trial." It does not square with the Sixth Amendment guarantee to give the defendant a speedy trial

which denies him due process of law under the Fifth Amendment and wait to give him a "fair trial" until three years later.

CONCLUSION

The petitioner's rights to a speedy, fair and impartial trial under the Sixth Amendment have been abrogated.

This court's directives in North Carolina v. Pearce and the Constitution's prohibition against double jeopardy have either been carelessly overlooked or deliberately ignored by the court below.

Wherefore, a Writ of Certiorari should issue to review the judgment and opinion of the United States

Court of Appeals for the Ninth Circuit in the instant action.

RESPECTFULLY SUBMITTED this 10th day of February, 1978.

MICHAEL J. BROWN
222 North Court Avenue
Tucson, Arizona 85701
Attorney for Petitioner

CERTIFICATE OF SERVICE

Counsel for the petitioner avows that he has deposited in the United States Post Office in Tucson, Arizona, with first class postage prepaid, three copies each of petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, to:

United States Attorney
District of Arizona
Post Office Box 1951
Tucson, Arizona 85702

and

SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

Dated: February 10, 1978.

MICHAEL J. BROWN

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 77-2053
vs.	)	
RUBEN MORALES ROBLES, Defendant-Appellant.	)	OPINION

Appeal from the United States District Court for the District of Arizona

Before: TRASK, WALLACE and ANDERSON, Circuit Judges

PER CURIAM

PRIOR PROCEEDINGS

Appellant Ruben Morales Robles (Robles) was indicted on May 9, 1974. The indictment charged him with knowingly and intentionally distributing 486 grams of cocaine in violation of 21 U.S.C. 841 (a)(1).

On August 14, 1974, the case was tried and the jury found Robles guilty

as charged. On September 18, 1974, he was sentenced to imprisonment for five years, a $3,000.00 fine, and a five-year term of probation. He appealed and was released on bond pending appeal.

On May 1, 1975, a panel of this court reversed and remanded the case with directions to dismiss the indictment. On October 16, 1975, however, the case was withdrawn from the panel and taken en banc by this court. On July 26, 1976, the en banc court reversed Robles' conviction and remanded the case for retrial. United States v. Robles, 546 F.2d 798, 804 (9th Cir. 1976). Robles' petition for writ of certiorari was denied by the United States Supreme Court on February 22, 1977 (97 S. Ct. 1155).

After remand the case proceeded to trial on April 5, 1977. Robles was again found guilty by the jury. On

April 28, 1977, he was sentenced to the exact same sentence as was originally imposed after his first conviction. Robles appeals. We affirm.

I.

Robles first argues on this appeal that the three-year delay from the date of the offense to his retrial (after his successful appeal) denies him his Sixth Amendment right to a speedy trial. This argument is without merit. Robles was afforded a speedy trial in August, 1974, five months after the indictment was filed, which resulted in his conviction. That conviction was vacated by this court for reasons not related to this appeal. What happened was that defendant was afforded a speedy trial; his conviction was vacated on appeal; and he was retried and again convicted. These facts do not amount to a denial of his Sixth Amendment rights. Harrison v. United States, 392 U.S. 219, 221, n. 4 (1968);

see generally Barker v. Wingo, 407 U.S. 514 (1972), and United States v. Simmons, 536 F.2d 827 (9th Cir. 1976).

II.

Robles next argues[1/] that he was denied due process of law when the trial court imposed the same sentence on re-conviction as was originally imposed after his first conviction. During the appeal process Robles was released on bond. As a condition of his release, he was required, among other things, to obey all laws, remain within the jurisdiction unless court permission was granted to travel, obey all court orders, and keep

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1/ Also, in his opening brief, Robles argues that the trial court made "repeated erroneous rulings" on evidentiary matters which caused a "chilling effect" on his right to a fair trial and interfered with his right to assistance of counsel. Based on our reading of the trial record, we find this argument to be without merit.

his attorney posted as to his address and employment. Robles contends that these contraints on his freedom were "punishment" and that he should be given credit for this "time served" while on bond. We cannot agree. While 18 U.S.C. §3568 does provide that persons sentenced shall be given credit for time served "in custody," the time spent on bail or on bond pending appeal is not time served "in custody," Sica v. United States, 454 F.2d 281, 282 (9th Cir. 1971); United States v. Peterson, 507 F.2d 1191 (D.C. Cir. 1974). Therefore, Robles is not entitled to have this time spent on bond pending appeal credited against his original sentence. We do note, however, that during the various proceedings against Robles he did spend five days actually in custody. Under 18 U.S.C. §3568 he should be given credit for this time served and the government

concedes this. We are confident that the Attorney General, acting through the Bureau of Prisons and the Parole Commission, will discharge his statutory duties under 18 U.S.C §3568 and afford to Robles full credit for the five days spent in custody. In all respects the judgment of the district court is

AFFIRMED.

APPENDIX B

[Caption: See Appendix A]

MOTION FOR REHEARING
AND SUGGESTION FOR
REHEARING EN BANC

[Table of Authorities and Index incorporated by reference thereto]

SUGGESTION FOR REHEARING EN BANC

TO THE HONORABLE JUDGES OF THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT:

COMES NOW the appellant and suggests that this matter be heard en banc for the reason that this issue is a matter

of first impression in this Circuit, and has not been decided in any other Circuit. Additionally, it is a matter of exceptional importance in that it affects every criminal defendant who, after appeal, is retried and/or resentenced for the same offense.

Respectfully submitted this 11th day of November, 1977.

[Signed by Mr. Brown, counsel]

MOTION FOR REHEARING
AND MEMORANDUM

COMES NOW the appellant, RUBEN MORALES ROBLES, by his attorney, MICHAEL J. BROWN, P.C., and respectfully petitions this Honorable Court for a rehearing of the above case for the following reasons and upon the following grounds:

The defendant/appellant respectfully suggests that the per curiam opinion of the panel either misunderstood the issues raised by defendant's

appeal or chose to side-step those issues entirely.

The argument was not made that a trial in August of 1974, subsequent to an arrest in April of 1974, was not "speedy" under the command of the Sixth Amendment to the United States Constitution. The argument was that the Sixth Amendment mandates not merely a "speedy trial" but a trial that is also "fair." The reversal of defendant's conviction shows conclusively that the first trial, while it may have been speedy, was not "fair." Defendant argues that he must be given a fair and speedy trial under the Sixth Amendment and that those two adjectives must honestly modify and describe the same trial. We believe it does not square with the Sixth Amendment guarantee to give defendant a "speedy trial" which denies him due process of law under the Fifth Amendment, and then

give him a "fair trial" three years later. The opinion of the Court ignored, rather than met, this argument. Counsel may be wrong concerning his perception of the Sixth Amendment; however, the argument was not advanced speciously and is not answered by stating that defendant received a speedy trial in August of 1974.

Defendant Robles brought an issue that apparently is of first impression before the Court on this appeal:

> IMPOSING UPON A DEFENDANT EXACTLY THE SAME SENTENCE AFTER HIS APPEAL AND RETRIAL, WHEN THERE HAS BEEN MORE THAN A THREE YEAR DELAY BETWEEN THE OFFENSE AND RESENTENCING, DURING WHICH PERIOD DEFENDANT WAS "FREE" UNDER VERY STRICT TRIAL AND APPEAL BOND RESTRICTIONS AND LED AN EXEMPLARY

LIFE IS ADDITIONAL PUNISHMENT FOR EXERCISING HIS RIGHT TO APPEAL AND IS A DENIAL OF DUE PROCESS GUARANTEED UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The defendant acknowledged both in his briefs previously filed and in this Motion for Rehearing that the phrase "in custody" does, in fact, mean different things and describes a different status with respect to 18 U.S.C. §3568, and the habeas corpus cases such as Jones v. Cunningham, 371 U.S. 244, 83 S.Ct. 373 (1962), and Hensley v. Municipal Court, 411 U.S. 345. However, none of the cases cited by this Court in its opinion or in any of the federal digests from any of the circuits, has dealt with the problem as presented by this defendant. The Courts have held, uniformly, that the status of being "in custody" for the

purpose of bringing habeas corpus is not the same "in custody" contemplated in 18 U.S.C. §3568; Hensley specifically, stating, that the "custody referred to in the habeas cases is not that 'custody' contemplated by §3568. . . A federal sentence does not begin to run and credit thus accrue, until the prisoner is received at the place of imprisonment." Hensley v. Municipal Court, supra. The Court states that they "must agree with the Ninth Circuit that there is no reason for treating time spent on bail as jail time." Sica v. United States, 454 F.2d 281 at 282 (9th Cir. 1971). Also see, Marchese v. McEachen, 451 F.2d 555 (9th Cir. 1971). This Court says, "The time spent on bail or on bond pending appeal is not time served 'in custody'."

THAT ISSUE AND THAT STATEMENT OF THE LAW IS NOT DISPUTED BY THIS DEFENDANT, NOR WAS IT DISPUTED BY THIS DEFENDANT AT

THE TIME BRIEFS WERE FILED IN THIS APPEAL.

What this defendant urged upon the Court then, and urges on this Court now, is that none of the cases in any of the federal reporters or digests have dealt with the issues as presented by the defendant: That the restrictions on his liberty demanded by the appeal bond that he posted for the purposes of prosecuting a successful appeal constituted punishment in some degree. Certainly, it was not the same degree of punishment as being actually incarcerated during the same period of time; however, it was punishment nevertheless. None of the cases cited by this Court in its opinion, or any of the other cases that are similar in nature, deal with the issue raised by defendant's appeal: namely, that North Carolina v. Pearce, 395 U.S. 711 (1969), mandates that the defendant be given some credit against his sentence

for the punishment exacted by the restrictive appeal bond for a 3-1/2-year period. Defendant does not suggest or request that he be given one-for-one credit; defendant does suggest to this Court that he has been "punished" to some extent by the restrictive nature of the appeal bond, and that the district court in resentencing him had a duty to give him some credit for that punishment, or be in violation of the clear mandate of Pearce.

If the restriction imposed by the appeal bond in this case is not any punishment, then the Court should say so; if it is punishment and the defendant is not entitled to any credit, then the Court should say so; if the defendant has been punished to some extent, and this Court belives that Pearce should not apply for one reason or another, then it should say so; if the Court believes

that the defendant has been punished and should be given some credit for that punishment because of the Pearce case, then it should send this case back to the District Court for a hearing to determine how much credit the defendant should, in all fairness, be allowed against his sentence for the punishment already exacted against him.

Those cases which deal generally with this issue (but none of which deal with the effect of the Pearce decision on the question of punishment) are as follows:

Sica v. United States, 454 F.2d 281 (9th Cir. 1971);

United States v. Peterson, 507 F.2d 1191 (U.S.C.A., D.C. 1974);

Leyvas v. United States, 371 F.2d 714 (1967);

Marchese v. McEachen, 451 F.2d 555 (9th Cir. 1971);

Polakoff v. United States, 489 F.2d 727 (5th Cir. 1974);

Cochran v. United States, 489 F.2d 691 (th Cir. 1974).

The defendant's previous appeal in this case was successful; it was, in fact, a meritorious appeal. The restriction on defendant's liberty during the pendency of that appeal was punishment. Punishing a defendant for pursuing a meritorious appeal, and then failing to give him SOME credit for that punishment is clearly unfair, and has an obvious chilling effect on the right to appeal.

Defendant respectfully requests that he be granted a rehearing in this matter, and that the rehearing be en banc, so that this Circuit may address this issue fully and completely.

Respectfully submitted this 11th day of November, 1977.

[Signed by counsel]

[Certificate of Service by Reference]

APPENDIX C

[CAPTION OMITTED]

ORDER

Before: TRASK, WALLACE and ANDERSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED: January 10, 1978.

[unsigned]

APPENDIX D

[CAPTION OMITTED]

CRIMINAL APPEAL BOND

KNOW ALL MEN BY THESE PRESENTS:

That RUBEN M. ROBLES, of the City of Tucson, State of Arizona, as Principal, and MARY ALICE ROBLES, a _____, as surety, are jointly and severally held and firmly bound unto the United States of America in the sum of FIFTEEN THOUSAND ($15,000) DOLLARS for the payment of which said sum we and each of us bind ourselves, our heirs, executors, administrators, successors, and assigns, if default shall be made in the conditions following, to wit:

WHEREAS, lately on the 28th day of April, 1977, in the United States District Court for the District of Arizona, Tucson Division, in a cause pending in

said District Court between the United States of America and RUBEN M. ROBLES, Defendant, a judgment and sentence was rendered against the said RUBEN M. ROBLES for violation of Sections 841(a) (1) of Title 21 U.S. Code, whereby the said RUBEN M. ROBLES was sentenced to the custody of the Attorney General for a period of five (5) years and with a Special Parole Term of 5 years; and, a $3,000.00 fine; and,

WHEREAS, the said RUBEN M. ROBLES has filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the said judgment and sentence, and

WHEREAS, bail on appeal was fixed in the amount of FIFTEEN THOUSAND ($15,000.00) DOLLARS pending the disposition of said appeal,

NOW, THEREFORE, the conditions of this obligation are such that if said

RUBEN M. ROBLES shall appear in person, or by his attorney (if permitted by the Court), in the United States Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his appeal and shall abide by and obey all orders made by said Court in said cause; and if the said RUBEN M. ROBLES shall surrender himself in execution of said judgment and sentence if the appeal is affirmed or modified by the said United States Court of Appeals for the Ninth Circuit, or the appeal is dismissed; and that if the said RUBEN M. ROBLES will appear for retrial in the United States District Court for the District of Arizona and abide by and obey all orders made by said Court on such day or days as may be appointed for retrial by said United States District Court, provided the said judgment and

sentence be reversed; and if the defendant appears as ordered, then this bond is to be void, but if the defendant fails to perform this condition, payment of the amount of the bond shall be due forthwith. If the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the United States District Court for the District of Arizona against Principal and Surety, and each of them, for the amount above stated, together with interest and costs, and execution may be issued or payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

The United States District Court has set the following restrictions as a condition to the said RUBEN M. ROBLES being released on appeal bond:

1. To prosecute the appeal without

delay and fully comply with the Appellate Rules governing said appeal.

2. To obey all Federal, State and Local laws.

3. To keep his attorney and the Clerk of the District Court advised of his current address and telephone number; if employed, the name, address and telephone number of his employer; to report any changes immediately.

4. To carry out and follow all orders of the Courts and make such appearance as ordered or required, and surrender himself to such authorities as directed by the Courts.

5. Not to travel outside the Counties of Pima in the State of Arizona, without permission

of the Court.

Principal certifies that he has read the foregoing and fully understands the requirements that he must adhere to. He also understands that if he fails to fulfill the requirements and conditions of his release, that this bond shall be forfeited, a warrant of arrest shall be issued for his apprehension, and that he shall be subject to the possibility of having another violation charged against him.

DATED: April 29, 1977.

[Signed and verified appropriately]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1142

RUBEN MORALES ROBLES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR REHEARING ON DENIAL OF APPLICATION FOR WRIT OF CERTIORARI

MICHAEL J. BROWN, P.C.
222 North Court Avenue
Tucson, Arizona 85701
Counsel for Petitioner

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Counsel for Petitioner

INDEX

TABLE OF AUTHORITIES

Ruben Morales Robles, Petitioner herein, respectfully moves for rehearing of this Honorable Court's denial of his Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit entered on March 20, 1978.

OPINION BELOW

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 1, 1977. A denial of a timely petition for rehearing was entered on January 13, 1978. Petitioner filed his Application for Certiorari with this Court on or about February 13, 1978, which was denied on March 20, 1978.

AUTHORITY

Petitioner files this Motion for Rehearing pursuant to Rules 58 and 59 of the United States Supreme Court.

The Opinion of the United States Court of Appeals for the Ninth Circuit is attached as Appendix A to Petitioner's Application for Writ of Certiorari previously filed February 13, 1978.

ARGUMENT

This Court should grant the petition in the instant case because:

THE NINTH CIRCUIT HAS RULED ON AN IMPORTANT FEDERAL QUESTION CONCERNING THE RIGHTS OF AN ACCUSED AND THE CONSTRUCTION OF A FEDERAL STATUTE; THIS QUESTION HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In Hensley vs. Municipal Court, 411 U.S. 345, 93 S.Ct. 1571, this Court recognized that the conditions imposed upon a defendant, while released on his own recognizance pending appeal, were sufficiently stringent as to constitute CUSTODY within the habeas corpus statute. 28 U.S.C. 2241 (c)3, 2254 (a). It is submitted that many of the reasons put forth by this Court for finding CUSTODY present under the habeas corpus statute are equally applicable to 18 U.S.C. 3568. As such, 18 U.S.C. 3568 should be applied

to the instant case, and the defendant given some credit against his sentence for the time spent in custody while pursuing his appeal.

In Hensley, supra, this Court found the habeas corpus statute and writ were to be applied only in cases of special urgency; where severe and immediate restraints were put on a person's liberty.

> "The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty . . . [I]ts [the writ's] use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate."

Hensley, supra, at 351.

In determining what made these restraints severe, this Court stated:

> "First he is subject to restraints not shared by the public generally, Jones v. Cunningham, 371 U.S. 236, is, the obligation to appear 'at all times and places as ordered' by 'any court or magistrate of competent jurisdiction.' He cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice. Disobedience is itself a criminal offense. The restraint on his liberty is surely no less severe than the conditions imposed

on the unattached reserve officer whom we held to be 'in custody' in Strait v. Laird, 406 U.S. 341." Hensley, at 351.

It was because of these restrictions on the defendant's liberty that this Court held he was within CUSTODY under 28 U.S.C. 2241. CUSTODY, by its very nature, implies a loss of liberty. A defendant is under the control and at the mercy of the government without the insulating safeguards afforded a person not in CUSTODY. As the instant defendant suffered restraints identical to those in Hensley, he, too, was in CUSTODY.

But the CUSTODY that must be construed by this Court is in 18 U.S.C 3568, not 28 U.S.C. 2241. 18 U.S.C. 3568 reads in pertinent part:

". . . The Attorney General

shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. . . . "

Only three circuits have interpreted 18 U.S.C. 3568 against the backdrop of Hensley v. Municipal Court, supra. United States v. Peterson, 507 F.2d 1191 (D.C. Cir. 1974), Cochran v. United States, 489 F.2d 691 (5th Cir. 1974); Polakoff v. United States, 489 F.2d 727 (5th Cir. 1974); Ortega v. United States, 510 F.2d 412 (10th Cir. 1975). All but one of the circuits, United States v. Peterson, supra, treated the issue summarily, and each found no CUSTODY under 18 U.S.C 3568 unless the defendant were incarcerated. It would seem these

decisions misconstrue the spirit, if not the holding of Hensley. Can a defendant be IN CUSTODY and yet not IN CUSTODY under the laws of the United States Congress? An affirmative answer invokes Humpty Dumpty's rationale in "Alice in Wonderland":

> Humpty Dumpty said in a mournful voice, "When I use a word it means just what I choose it to mean, neither more nor less."
>
> Alice said, "The question is whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "Who is to be the master, that is all!"
>
> Lewis Carroll,
> "Alice in Wonderland"

It would seem that finding the defendant in the instant case not within the contemplated CUSTODY of 18 U.S.C. 3568 would ignore the definition of CUSTODY as set forth in Hensley, supra. It is respectfully submitted that this Court find the defendant within CUSTODY. As such, the defendant should be given some credit against his sentence for the time spent on a highly restrictive appeal bond.

Respectfully submitted,

MICHAEL J. BROWN
222 North Court Avenue
Tucson, Arizona 85701
Attorney for Petitioner

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

I, MICHAEL JOHN BROWN, counsel of record for the petitioner in the above-entitled petition, certify that this petition is presented in good faith and not for purposes of delay. Pursuant to United States Supreme Court Rule 58(2), 28 U.S.C.A., counsel further certifies that this petition is brought on substantial grounds that were available to petitioner although not previously presented. While the grounds submitted in this petition were previously available, they were not presented in the petition for writ of certiorari because at that time counsel thought the instant case should be controlled by North Carolina v. Pearce, 395 U.S. 711 (1969), rather than 18 U.S.C. 3568.

MICHAEL J. BROWN

SUBSCRIBED AND SWORN to before me this 12 day of April, 1978.

NOTARY PUBLIC

My Commission expires:

March 4, 1982

CERTIFICATE OF COUNSEL

Counsel for the petitioner avows that he has deposited in the United States Post Office in Tucson, Arizona, with first class postage prepaid, three copies each of petitioner's Motion for Rehearing to:

UNITED STATES ATTORNEY
District of Arizona
Post Office Box 1951
Tucson, Arizona 85702

and

SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

Dated: April 12, 1978

MICHAEL J. BROWN